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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP K. TOLBERT, Defendant and Appellant.	B219568 (Los Angeles County Super. Ct. No. KA049848)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Reversed and remanded.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

Phillip K. Tolbert appeals from an order modifying his sentence following a letter from the Department of Corrections, Division of Adult Institutions, Legal Processing Unit. The letter informed the trial judge of an error in the sentence. In sentencing on a subordinate term for dissuading a witness (Pen. Code, § 136.1, subd. (b)(1); all further code citations are to this code), the court imposed one-third the midterm for the crime, which is the usual practice for subordinate term sentencing under the determinate sentencing law. (§ 1170.1, subd. (a).) This resulted in an eight-month subordinate term as part of a 14-year aggregate sentence.[1]

As the letter from the Legal Processing Unit pointed out, section 1170.15 requires that a full term sentence be imposed, rather than one-third of the middle term, when the subordinate term is for a conviction of section 136.1, as it was in this case, or section 137.[2] Shortly after receipt of this letter, the trial court initiated proceedings to correct the sentence. These culminated in a hearing in October 2009. At the hearing, the trial court explained that it had imposed an illegal sentence, which it was required to correct. The court also pointed out that since appellant was a second-striker, having previously suffered a serious felony conviction, his sentence for dissuasion was subject to doubling under the Three Strikes law (§§ 667, subd. (b)-(j) and 1170.12, subd. (a)-(d)), resulting in a subordinate term of four years rather than two years.

The colloquy turned to a request by defense counsel that the court exercise its discretion under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, to dismiss the prior conviction for purposes of the section 136.1 sentence, an action which, if taken, would have resulted in a two-year sentence for the subordinate term. The

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[1] There were two previous appeals from the original judgment. Each was decided in a nonpublished opinion. In the first (*People v. Tolbert* (Mar. 13, 2002, B152497), we rejected a claim of error in instructions; in the second (*People v. Tolbert* (Sept. 20, 2002, B157901), we modified the judgment with respect to conduct credits. Both opinions discuss the underlying facts of appellant's crimes. It is unnecessary to repeat that discussion here.

[2] The crimes were committed in August 2000. Defendant was sentenced in August 2001, and the letter was dated July 20, 2009.

court rejected this request because, as it understood the law, it lacked discretion to do so. The court explained:

"In order to not impose four years, the court would have to strike—would have to grant a *Romero* motion as to the entire case in which case the sentence in this case would be so disproportionate to what we're talking about that I don't think it makes a lot of sense.

"It was a mistake, but it was a sentencing mistake after trial—you're absolutely correct, Mr. Borges [defense counsel]—which means it didn't affect the validity of the trial. It didn't affect the evidence that was presented. It certainly wasn't error on your part. I'm not even sure if you knew about this that you had an obligation to tell the court. You may have done well just to keep it to yourself because up until the point in time when the Department of Corrections caught the error, it was what it was. The sentence was there.

"I don't believe there's any discretion. I don't think that this is something that the court can consider and say in my discretion I choose to either impose the two years doubled or to impose two years not doubled. In any event, the two years has to be imposed, so I'm indicating I don't believe I have any discretion."

In this, the trial court erred. In *People v. Garcia* (1999) 20 Cal.4th 490, the Supreme Court addressed the question "whether a trial court, when applying the 'Three Strikes' law [citation] may exercise its discretion under section 1385, subdivision (a), so as to dismiss a prior conviction allegation with respect to one count but not another." (*Id.* at pp. 492-493.) The court held that a trial court "may exercise its discretion in this way and that the trial court did not abuse its discretion in doing so here." (*Id.* at p. 493.) Although the Three Strikes law is a single and indivisible sentencing scheme that either applies or does not apply, it incorporates judicial discretion under 1385, "which authorizes trial courts to dismiss prior conviction allegations on a count-by-count basis. [Citation.] Therefore, though a defendant's prior conviction status does not change from one count to another, and though it is appropriate to allege that status only once as to all

current counts, *the effect under the Three Strikes law* of a defendant's prior conviction status *may* change from one count to another." (*Id.* at p. 502.)

Appellant argues that the proper remedy in this situation is to remand the case to the trial court so that it can exercise its discretion under section 1385. Respondent commendably agrees, as do we. Where the trial court fails to exercise discretion due to the mistaken belief that it has none, the proper course on appeal is to remand the case so that it may exercise its discretion. (*People v. Sanders* (1997) 52 Cal.App.4th 175, 178, disapproved on another point in *People v. Fuhrman* (1997) 16 Cal.4th 930, 947, fn. 11.) Since the record is clear that the trial court believed it could not exercise discretion to strike a prior conviction for purposes of sentencing on any count unless it did so for all counts, we shall reverse the trial court's order from which this appeal is taken so that the court may exercise its discretion as recognized in *Garcia*.[3]

DISPOSITION

The amended judgment of the trial court is reversed and the case is remanded to the trial court for exercise of its discretion under section 1385.

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EPSTEIN, P.J.

We concur:

MANELLA, J. SUZUKAWA, J.

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[3] Of course, we express no opinion as to how that discretion should be exercised.